

Later, in an Order dated May 16, 2013, the ALJ found claimant entitled to medical care and the payment of temporary total benefits for an injury to her cervical spine occurring on June 28, 2011. Dr. Doug Burton was designated as claimant's treating physician.

The respondent appeals that Order arguing that, while claimant has an undisputed preexisting cervical spine disease, she has not met her burden of proving the accident of June 28, 2011, caused a structural injury over and above symptomatic aggravation of a preexisting condition as required by K.S.A. 2011 Supp. 44-508.

Claimant contends she suffered significant trauma on the date of the accident which rendered her symptomatic and caused underlying structural changes in her cervical spine. Claimant argues the ALJ's decision should be affirmed.

The issues for the Board's review are:

1. Did claimant's alleged injury on June 28, 2011, arise out of and in the course of her employment with respondent?
2. Is the alleged injury the prevailing factor causing claimant's current condition and the need for medical treatment?

FINDINGS OF FACT

Claimant began employment with respondent in September of 2008. In June of 2011, claimant's job title was as a machine operator, which required she load and pack pallets of boxes and move them by machinery to designated areas. This position required claimant to lift and move boxes weighing from 5 to 60 pounds each.

On June 28, 2011, claimant was separating boxes on a pallet into groups, prior to hauling the pallet to its designated area. Claimant testified she lifted a 50 pound footwear box from the pallet and, when she twisted to throw it onto a pallet to her left, she felt and heard something pop in the right side of her neck. She stated she immediately felt pain that progressed down her arm into her fingers. Claimant informed her supervisor of the incident, and was sent to the company nurse. The nurse directed claimant to self-treat at home with heat or ice packs and ibuprofen. When the pain persisted into the next day, claimant notified the nurse and was referred to Occupational Health Services (OHS). OHS prescribed pain medication and chiropractic therapy, which claimant stated did not provide relief. Claimant was placed on light duty. An MRI of claimant's cervical spine was obtained, revealing multilevel disk degenerative changes as well as a focal disk herniation at C5-6. Claimant was referred to John M. Ciccarelli, M.D., who then referred her to Adrian P. Jackson, M.D.

Dr. Jackson, an orthopedic surgeon, initially examined claimant on August 15, 2011. Dr. Jackson diagnosed claimant with multilevel cervical spondylosis and stated she had clinical indications of early onset myelopathy. He recommended claimant undergo surgery on her cervical spine and placed her on restrictions, which respondent was unable to accommodate. Claimant was then paid temporary total disability compensation.

In his initial evaluation of claimant and in regard to the incident of June 28, 2011, Dr. Jackson reported:

I feel the injury she suffered on this date is the prevailing factor in her current clinical condition.

Clearly this one specific incident did not contribute wholly to the multi level degenerative nature of her cervical spine. Rather, she has suffered a symptomatic aggravation of her underlying condition . . .¹

Dr. Jackson later clarified his position in a letter to claimant's counsel dated April 4, 2013:

I certainly recognize that the underlying degenerative changes were present prior to the accident, but that is not relevant in my opinion if it was asymptomatic. To clarify, it is my opinion that the work-related injury on June 28, 2011, was the prevailing factor in the onset of the cervical radiculopathy that Ms. Hall [claimant] is describing had she treated successfully through conservative measures and eliminated the radiculopathy, treatment of the underlying cervical spine from a structural standpoint would be irrelevant.²

Claimant testified she never underwent surgery on her cervical spine because pre-surgery blood work results reported anemia, and claimant was required to take iron supplements before surgery would be allowed. The next time she became eligible for surgery, respondent's workers compensation insurance company denied her eligibility.

Respondent referred claimant to Paul S. Stein, M.D., a board certified neurosurgeon, for a second opinion and an examination on March 22, 2012. Claimant presented with complaints of neck and low back pain with symptomatology into both upper and both lower extremities, which she related to the incident of June 28, 2011. Dr. Stein concluded:

The incident at work has aggravated a preexisting but apparently asymptomatic condition and caused it to become symptomatic. However, the prevailing factor

¹ P.H. Trans. (Oct. 9, 2012), Cl. Ex. 1 at 6.

² P.H. Trans. (May 13, 2013), Cl. Ex. 1 at 21.

causing the symptomatology is the degenerative disease which was present previously.

I cannot make a definitive statement regarding the lower back as no investigation has been done in that area.³

Following her examination with Dr. Stein, claimant's primary physician referred her to Ali B. Manguoglu, M.D., a neurosurgeon. After examining claimant on August 6, 2012, and reviewing an MRI, Dr. Manguoglu diagnosed claimant with post-traumatic neck pain and predominantly left sided cervical radiculopathy with underlying cervical spinal stenosis, disk protrusions and small herniations multi-level. In his report of the same date, he notes:

I believe that the work related incident on 06/28/2011 has aggravated, accelerated, and agitated her neck condition, i.e., cervical spinal stenosis with small disk herniations. I believe that her present complaints of neck pain and cervical radiculopathy are causally related to the incident on 06/28/2011 at work.⁴

Dr. Manguoglu later opined "that the accident of June 28, 2011 is the 'prevailing factor' in the need for medical treatment."⁵

On October 9, 2012, a preliminary hearing was held and a Preliminary Hearing Order issued in which the ALJ denied claimant's request for medical treatment and benefits. The ALJ found claimant failed to sustain her burden of proof of personal injury by accident arising out of and in the course of her employment with respondent, as the medical evidence showed the incident of June 28, 2011, "aggravated and exacerbated [c]laimant's pre-existing cervical condition, rendering it symptomatic."⁶ No appeal was filed from that Order.

Claimant retained new counsel in January of 2013, who referred her to Dr. P. Brent Koprivica, a board certified physician. Claimant's complaints included constant severe neck pain, numbness and tingling in both hands and all fingers, occipital frontal headache, and intermittent weakness in both legs. After performing a physical examination and reviewing claimant's medical records, Dr. Koprivica issued a report on March 7, 2013. He found claimant had sustained structural change in her cervical spine as there was evidence of increased disk bulging and/or protrusions on her MRI scan. Dr. Koprivica stated:

³ P.H. Trans. (Oct. 9, 2012), Resp. Ex. A at 5.

⁴ P.H. Trans. (Oct. 9, 2012), Cl. Ex. 1 at 14.

⁵ P. H. Trans. (May 13, 2013), Cl. Ex. 1 at 23.

⁶ ALJ Order (Oct. 9, 2012) at 3.

I would clearly point out that Ms. Hall [claimant] did suffer new specific structural injury as a direct result of the June 28, 2011, injury.

I would also point out that without this injury, it would be speculative to state that Ms. Hall [claimant] would have symptomatic spinal stenosis with cervical radiculopathy and myelopathy that necessitates surgery at this point.⁷

Dr. Edward Prostic, a board certified orthopedic surgeon, examined claimant at her counsel's request on March 11, 2013. Dr. Prostic reported "the work-related accident sustained June 28, 2011 while working for Footlocker [sic] is the prevailing factor in causing the injury, the medical condition and the need for medical treatment."⁸

Dr. Stein issued an additional report at respondent's request on May 2, 2013, after reviewing claimant's most recent medical records. He stated he did not see any acute changes on claimant's MRI scans of the cervical spine. He further noted:

While I agree that there is a relationship between the current symptoms and the incident at work, the extent of the preexisting disk disease and stenosis is such that I believe the prevailing or primary factor is the degenerative disease and not be [sic] specific incident at work.⁹

Claimant testified she continues to suffer from severe pain in her neck and arms to the extent her daily activities are limited and her sleep is interrupted. She continues to take pain medication. Claimant has been off work since August 15, 2012.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(a)(b)(c) states:

- (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
- (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

⁷ P.H. Trans. (May 13, 2013), Cl. Ex. 1 at 16.

⁸ P.H. Trans. (May 13, 2013), Cl. Ex. 1 at 28.

⁹ P.H. Trans. (May 13, 2013), Resp. Ex. B at 2.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event , usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2011 Supp. 44-508(f)(1)(2) states:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2011 Supp. 44-508(f)(3)(A) states:

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

- (iii) accident or injury which arose out of a risk personal to the worker; or
- (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2011 Supp. 44-508(g) states:

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

The ALJ set out a thorough analysis of the conflicting medical opinions in this matter. Originally, the ALJ found claimant had failed in her burden of proving causation and prevailing factor. The addition of several new medical opinions along with clarifications from previous examining physicians convinced the ALJ that claimant's accident on June 28, 2011, caused a structural change in claimant's cervical spine sufficient to cause actual damage to the physical structure of claimant's neck.

This Board Member finds the opinions of Dr. Jackson, Dr. Koprivica and Dr. Manguoglu to be the most persuasive that claimant suffered a physical change sufficient to qualify as a personal injury which arose out of and in the course of her employment. This physical change from the accident is the prevailing factor leading to claimant's current problems and need for medical treatment. The Order of the ALJ is affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹¹

CONCLUSION

Claimant has satisfied her burden of proving she suffered personal injury by accident on June 28, 2011, which arose out of and in the course of her employment with respondent, and that accident is the prevailing factor leading to her current problems and need for medical treatment. The Order of the ALJ is affirmed.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Rebecca Sanders dated May 16, 2013, is affirmed.

¹⁰ K.S.A. 2012 Supp. 44-534a.

¹¹ K.S.A. 2012 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this _____ day of July, 2013.

HONORABLE GARY M. KORTE
BOARD MEMBER

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